Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

DOLPH BRYAN, individually and in his official capacity as Sheriff of Oktibbeha County,

Cross-Petitioner,

v.

JESSE ODEN,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CONDITIONAL CROSS-PETITION

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QUESTIONS PRESENTED

1. Is not the applicability of the so-called "personal staff exemption" in 42 U.S.C. § 2000e(f) in effect a question of inclusion for coverage and thus a question of jurisdiction for the Court, subject to plain error?

2. Should not the Court's review of "emotional distress" for compensatory damages require some degree of proof beyond a mere statement of the plaintiff?

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Cross Petitioner, Dolph Bryan requests that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit

OPINIONS BELOW

March 27, 2001 opinion of the Court of Appeals in the present matter is reported at 246 F.3d 458 and is reproduced in the appendix to the Petitioner's petition at Pet. App. 1.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was issued on March 27, 2001. The court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court. The original petition was docketed on June 27, 2001.

STATEMENT OF THE FACTS

The Complaint before the lower court dealt with the issue of whether or not Plaintiff, Deputy Jesse Oden of the Oktibbeha County Sheriff's Department, was a victim of racial discrimination under Title VII of the U.S.C. when Defendant Sheriff Dolph Bryan made a decision to designate Deputy George Carrithers as "Chief Deputy."

Both Deputy Oden and Deputy Carrithers joined the Sheriff's Department at the same time, September 1976.

Oden was employed part time; starting as a radio operator and then patrolling with a constable, which was not paid work. (R. Vol. 2 Oden, p. 5-6).

Carrithers began as a part time jailer (R. Vol. 2 Oden, p. 7). Oden was promoted to road deputy in 1977 patrolling nights and weekends. (R. Vol. 2 Oden, p. 8). Because of the small size of the department and budget, he was only allowed to work 32 hours a week. In 1979, Oden was offered a full time position as Deputy. (R. Oden, p. 9). At the time, there were only two deputies at the Sheriff's Office.

In 1980, Carrithers became a full time road deputy. In 1986, the Chief Deputy was fired and Oden approached the Sheriff about the position and was told because of the size of the Department he was not going to appoint a Chief Deputy at that time. (R. Oden, p. 15).

About the same time, a secretary quit and the office was in need of administrative help. (R. Vol. 3, p. 281). Carrithers began to help out and, over time, became the Administrative Assistant. Oden stated that he did not question the Sheriff about this change.

Oden stated that he concluded from all this that the Sheriff was "motivated by discrimination." (R. Oden, p. 16).

Oden stated that he observed the hiring practices after 1986, and that it appeared to him that more qualified black applicants were rejected in favor of lesser qualified white applicants. (R. Oden, p. 19). On cross, Oden admitted he was unaware of the content of their applications and did not participate in any way in the interview process. (R. Oden, p. 81). Oden noted two people who applied for employment and were turned down. However, both were employed in part time positions and never received full time positions for budget reasons. (Vol. 12, p. 20).

In March 1996, Oden had a heart attack and then surgery which kept him out of work until July, 1996. In December of 1996, the Sheriff designated Carrithers as Chief Deputy. Oden testified that his qualifications were better due to his law enforcement training. (R. Oden, p. 33). Oden continued as road deputy. There was no change in either one's pay.

REASONS FOR GRANTING THE CROSS-PETITION

The Appellee in this case from the United States Court of Appeals for the Fifth Circuit has petitioned this Court for a Writ of Certiorari. In the Fifth Circuit, the court allowed a part of the District Court's order, a twenty thousand dollar award against the Sheriff in his official capacity to stand, and dismissed the County and withheld punitive damages.

Oden attempts (1) to suggest in his petition the error of the court in its consideration of punitive damages; and (2) present two questions.

Sheriff Bryan also believes the court failed to adequately consider two issues that have a critical impact upon his case. Sheriff Bryan files this cross-petition requesting that if Oden's petition is granted and writ issued, the Court will include the cross-petition so as to effect a total disposition on the various issues. The Cross-Petitioner, Sheriff Bryan, poses two questions.

First, would not the so-called "personal staff exemption" in 42 U.S.C. § 2000e(f) be a question of coverage or inclusion rather than an exemption and thus a question of jurisdiction for the Court? And, therefore, should not the resulting review by the courts be under a plain error standard?

Secondly, should not the Court's review of "emotional distress" for compensatory damages require some degree of proof beyond a mere statement?

I. PARTY MUST PLEAD COVERAGE UNDER TITLE VII

A party seeking redress under Title VII must plead coverage under the Act in order to invoke its provisions. Pursuant to the terms of the Act, such party must be an "employee" under the Act's definitions and the defendant must be a covered "employer." Title VII, Chapter 42 U.S.C.A. § 2000e(f) provides:

> The term "employee" means an individual employed by an employer, except that the term "employee" *shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level* or an immediate adviser with respect to the exercise of the constitutional or legal powers or the office. The exemptions set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

The foundation for Section 1981 and Title VII is rooted in the theory of employment contracts. In viewing this

definition, it is instructive to note that although it has been referred to as the "personal staff exemption," it is, in fact, not written as an exemption at all, rather as a limitation on who qualifies as an employee capable of invoking Title VII. Contrary to the appeals court holding, the fact of whether or not a party is an employee for purposes of the statute is not an affirmative defense to be plead. Rather, based upon the language "the term 'employee' shall not include," the plaintiff must plead inclusion. Therefore, the question of whether or not an employee for coverage purposes is, in fact, an "employee" is a question of jurisdiction for the Court and subject to the plain error rule at any time.

The court below dismissed the application of the "personal staff exemption" on the basis that they view it as an affirmative defense and it was not raised until the post-trial motion. This appears to be an erroneous interpretation. In the district court below, Sheriff Bryan presented uncontroverted testimony demonstrating the nature of the position of chief deputy, his qualifications and duties and relationship to the Sheriff. Under the terms of Title VII, it appears to be a mandatory pre-requisite to establish one's coverage by Title VII before invoking Title VII.

A. "Personal Staff Exemption"

First, Sheriff Bryan submits that the so-called "personal staff exemption" is not, in fact, an exemption at all, rather is an affirmative statement of inclusion and exclusion for purposes of the statute. And, therefore, rather than being a "claim," it imposes proof of inclusion on the plaintiff in order to establish coverage, i.e., jurisdiction. Whether a party can bring suit under a particular statute does not depend upon the defendant's claim of non-coverage or of an exemption, but upon the plaintiff's establishing jurisdiction of the parties and the cause of action.

Numerous cases have proceeded through the courts addressing the question of who is an "employer." The determination of who is an "employer" is critical in applying Title VII. It is equally as crucial that a determination of whether or not a person seeking redress is an employee under the terms and definitions of Title VII be made. Such determination thereby requires the plaintiff in such suits to plead coverage in order to establish jurisdiction and standing to sue.

Prior to filing suit, a plaintiff must determine under which statute or basis he brings the suit. Therefore, it is necessary that the plaintiff plead applicability and show how he falls under the protection of the statute. If he is not in a position to show he meets the inclusionary terms, then there is a jurisdictional question that can be raised at any time. The question was clearly raised in the defendant's post-trial motion.

Furthermore, whether the question is properly pled should not be the end of such a critical inquiry. "It is the duty of the court to satisfy itself not only of its own jurisdiction but also that of the lower courts in the cause under review." *EEOC v. Chicago Clubs*, 86 F.3d 1423 (7th Cir. 1996) (citing *Mitchell v. Mauser*, 293 U.S. 237, 244, 55 S. Ct. 162, 79 L. Ed. 338 (1939). The Court is clearly empowered to raise this jurisdictional question *sua sponte*.

B. Plain Error Standard Of Review

Second, the review of the plaintiff's qualification as an employee for purposes of Title VII, like the government's exemption from punitive damages, is under a plain error standard. *United States v. Olano*, 507 U.S. 725 (1993). Both

the exemption from punitive damages and inclusion of only certain defined employees has been placed in the statute by Congress and serves as a clear indication of their intent to place certain restrictions or limitations on applicability. The need to demonstrate coverage under the Act as an employee is an affirmative one on the part of the plaintiff. The necessity of determining which employees are indeed covered under the Act is clear in the plain language of the statute. The plain language of the definition and Congress' obvious intent, make Title VII subject to a plain error standard. In this particular case, we are dealing with the chief deputy which connotes a special relationship with the sheriff in its very nature. Congress defined "employee" and thus, applicability for a purpose. Congress simply did not believe that an elected official should be so restricted.

While the statute does not definitively define "personal staff," the word "personal" certainly indicates exclusion to some intimate subset of the elected official's staff. *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996). "Congress intended for the personal staff exception to apply only to those individuals who are in highly intimate and sensitive positions of responsibility on the staff of an elected official." *Brewster v. Barnes*, 788 F.2d 985, 990 (4th Cir. 1986) (quoting *Owens v. Rush*, 654 F.2d 1370, 1375 (10th Cir. 1981). The Fourth Circuit in *Cromer* stated that "three times we have applied the personal staff exemption in cases involving sheriffs' offices." *Cromer*, 88 F.3d 1315. *See also United States v. Gregory*, 818 F.2d 1114 (4th Cir.), *cert. denied*, 484, U.S. 847, 108 S. Ct. 143, 98 L. Ed. 2d 99 (1987); *Curl v. Reavis*, 740 F.2d 1323 (4th Cir.); *Brewster*, 788 F.2d 985. In each of these cases, we were "unwilling to treat all deputy sheriffs as employees, or to exclude them wholesale from [the statute's] protection." *Id.* Instead, the

Court explained, that whether a given deputy would be treated as a member of a sheriff's personal staff depended on a "careful examination of the nature and circumstances of her role in the Sheriff's Department." *Id.*

In concluding that Cromer was "personal staff" as both captain and lieutenant, the Fourth Circuit applied the following "four primary factors":

1. Is promotion of the employee solely up to the sheriff;

2. Does the employee occupy a position high in the chain of command;

3. Does the employee have a highly intimate working relationship with the sheriff; and

4. Does the employee contribute to the making of policy decisions in the sheriff's department?

Id.

The court has further considered it significant whether the employee worked under the direction of the official or someone else. *Curl*, 740 F.2d at 1328.

The courts have recognized the sensitive nature of deputies' work and the sheriff's right to choose whom he wishes for political reasons.

In *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997), the court noted it is also clear that political affiliation is "an appropriate requirement for the effective performance of" the chief deputy position. *Branti v. Finkel*, 455 U.S. 507 at 518, 100

S. Ct. at 1294 (1980). "We find that defendant was entitled to select a person who[*sic*] he knew to share his political beliefs to occupy a position with such high levels of discretion and policymaking authority." *Branti*, 455 U.S. 518.

The conclusion of the Seventh Circuit Court regarding the chief deputy noted "that deputy sheriffs operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies." *Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991); accord *Dimig v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993). In *Upton*, the Seventh Circuit also noted that the sheriff is often elected because of "the popular approval of his expressed political agenda." *Upton*, 930 F.2d at 1215. It reasoned further that,

> Particularly in a small department, a Sheriff's core group of advisors will likely include his deputies. A deputy sheriff, in implementing the Sheriff's basic policy, will make some decisions that will actually create policy. Deputies on patrol or other assignment frequently work autonomously, giving them wide latitude and discretion in performance of their duties and in the implementation of department goals. In order to promote public confidence in law enforcement, the Sheriff depends on his deputies to publicly project his competence and the competence of the office. Deputies are also expected to provide the Sheriff with truthful, accurate and beneficial information which he needs to make decisions and administer his office. Id. (Citation omitted) (quoting *Livas v. Petka*, 711 F.2d 798, 801 (7th Cir. 1983)).

Id.

> In *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), the Eleventh Circuit considered a newly-elected sheriff who refused to rehire any of his predecessor's employees. It held that under Alabama law, "the closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention".

In this case, the Chief Deputy's position for which Carrithers was designated, having long ago assumed the duties and responsibilities, clearly met these four factors and would be considered as at least part of the personal staff of the elected Sheriff. Because of his role as the number two man in the department of an elected official, the Sheriff should have wide discretion in whom he chooses. The Mississippi statute gives him this flexibility, as does Title VII.

The determination of whether an employee falls under Title VII "affects substantial rights" such, as in this case, the difference between liability and non-liability and, as a result, warrants plain error review. *United States v. Atkinson*, 297 U.S. 157, 56 S. Ct. 391, 80 L. Ed. 555 (1936).

II. EMOTIONAL DISTRESS

This Court long ago addressed the review of emotional distress damages as requiring "competent evidence concerning the injury." *Cary v. Piphus*, 435 U.S. 247 (1978). However, the District and Circuit Courts have continued to apply different levels of proof to this point. It is so different so as to make it difficult, if not impossible, for either the Plaintiff or Defendant to understand the level of evidence necessary to support or deny such a charge.

Oden attempts to seek damages for purported emotional distress he has suffered as a direct result of him not obtaining the title of Chief Deputy. Oden's case for emotional distress is founded solely on his own testimony. There was no medical testimony or even corroborating testimony to establish any degree of an actual injury. Oden offered nothing other than his own conclusion as to the emotional distress. This simply is not sufficient.

The Supreme Court has long required that compensatory damages of emotional distress "be supported by competent evidence concerning the injury." *Carey v. Piphus*, 435 U.S. 247 at 264 n.20, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978). Failure to establish "actual injury" with sufficient evidence will result in the award of only nominal damages. *Carey*, 435 U.S. at 266-67, 98 S. Ct. 1042.

In *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), this Court set out to clarify the level of specificity required under *Carey*. Therein, the Court addressed two separate issues of the proof necessary to support mental anguish damages. First, the level of specificity needed to prove a claim for mental damages under the *Carey* decision. The Court held that there must be a "specific discernible injury to the claimant's emotional state," and proven evidence regarding the "nature and extent" of the harm. *Patterson*, 90 F.3d 940. The Court recognized that "hurt feelings, anger and frustration are part of life," and were not the types of harm that could support a mental anguish award. *Id.* at 940. Second, the Court discussed the types of evidence which may be used to clear that hurdle. The court later said "[a] claimant's testimony alone may not be sufficient to support anything more than a nominal damage award." *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998).

In *Brady, supra*, the court quoting from *EEOC Policy Guidance No. 915.002* § II(A) (2) (July 14, 1992), stated that "[e]motional harm will not be presumed simply because the complaining party is a victim of discrimination. The existence, nature and severity of emotional harm must be proved." The Fourth Circuit issued a similar decision in *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 1996), stating:

> Neither [a] conclusory statement that the plaintiff suffered emotional distress nor the mere fact that the constitutional violation occurred supports an award of compensatory damages. In marshaling the evidence necessary to establish emotional distress resulting from a constitutional violation, that "genuine injury" is necessary.

In this case, as in those cited above, Oden's own testimony is the sole source of evidence on mental damages. Oden's testimony at best was vague, conclusory and uncorroborated. Oden's sole testimony is that he has trouble "sleeping," that it "bothered" him and "he felt hurt." (R. Vol. 2, p. 43). Under *Carey*, *Patterson* and *Price*, the courts have determined that such insufficient and vague conclusions cannot legally support mental anguish damages.

A court must examine the evidence showing "the nature and extent of emotional harm caused by the alleged violation" to ensure that damage awards are not purely speculative. *Patterson*, 90 F.3d 927, 938, 117 S. Ct. 767. *See also Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir.) (finding a $500,000 award for emotional distress excessive in a failure-to-promote case marked by the plaintiff's "crying and shaking throughout most of the trial"), *cert. denied*, 117

S. Ct. 584 (1996); *Labonte v. Hutchins & Wheeler*, 424 Mass. 813, 824-826, 678 N.E.2d 853, 860-862 (1997); *Spragg v. Shore Care*, 293 N.J. Super. 33, 61-64, 679 A.2d 685, 699-700 (1996).

As the Supreme Court of Texas put it: "Not only must there be evidence of the existence of compensable mental anguish, there must also be some evidence to justify the *amount* awarded." *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607, 614 (1996) (emphasis added). "While the impossibility of any exact evaluation of mental anguish requires that juries be given a measure of discretion in finding damages, that discretion in limited." *Saenz*, 924 S.W.2d 614.

CONCLUSION

Sheriff Bryan, as Sheriff of Oktibbeha County and in his individual capacity, respectfully requests this Honorable Court take the opportunity presented by this case to state in unequivocal terms that the invocation of Federal Statutes protecting specific classes of individuals, mandates that any person claiming a violation thereunder must first establish that he or she is an individual for whom coverage was intended as defined therein; and that the award of compensatory damages demands more of a showing than one's own vague, uncorroborated, self-serving testimony.

Therefore, Cross-Petitioner, Dolph Bryan, Sheriff of Oktibehha County, Mississippi, for the above and foregoing reasons, and in view of the authorities cited, respectfully requests that should the Court grant the petition it should also grant this conditional cross-petition for writ of certiorari.

Respectfully submitted,

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